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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 933

ANDREW J. EASTER and MILDRED P. EASTER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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The petitioners pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, Richmond, Virginia, entered on December 1, 1964, affirming the decision of the Tax Court in this matter.

OPINION BELOW

The opinion of the chief judge and the circuit judges of the court of appeals stated "While it may be somewhat frustrating to him, the law is nonetheless settled that the acceptance of returns filed by the taxpayer in earlier years and the acquiescence in the taxpayer's depreciation basis and useful life figures contained therein for the purpose of approving tax refunds will not support the petitioner's estoppel argument or bar the Commissioner's action in

correcting a mistake in the taxpayer's prior returns when it is detected by him within the period of *limitations.*" (page II) herein.

The Notice of Appeal was filed in the said court on July 3, 1964, and was taken from a Tax Court decision entered March 6, 1964, (Brief and Appendix of Appellants, Petitioners, filed herein, pages 19-37).

JURISDICTION

The petition for Review of the Decision of the Tax Court of the United States, and the Appeal to the United States Court of Appeals, of the Fourth Circuit, reference the commissioner's disregard of the taxpayer's wish to continue using the procedure authorized prior to the present existing rules and the policy of the revenue department not to disturb the depreciation accounts used by taxpayer, since the present instructions reference guide line lives and rules do not supercede the than existing rules and procedures used by the petitioner.

And since the petitioners' costs and depreciation accounts have been questioned, approved and allowed, and the refunds paid between 1949 and 1957, inclusive; the respondent's alleged computations, for 1958 etc., are in error, illegal and not in accord with the department's policy and rules, nor consistant, etc., and disregards their having agreeing to and acceding as to the facts, costs and depreciation, etc., as stated by their counsel, Re: 1958 Return- on August 29, 1962, Statement by W. Victor Broenstrup, (R. Ex. J, p. 173-A-B, Brief and Appendix, pages 6-7), (page 7) herein. Liminations, not retroactive, Res judicata, Estopple. The jurisdiction to review the decree in question by writ of certiorari is invoked under Title 28, U.S.C., Section 1257.

QUESTIONS PRESENTED

1. Did the respondent err by readjusting the costs basis of petitioner's property and change the depreciation allowances used in prior years and stated in petitioner's 1958 tax return so as to involve a deficiency instead of refund as claimed?

   a. That had been questioned since 1949, reexamined, approved, etc. and refunds allowed until 1957?

   b. That had been agreed and acceded to on August 29, 1962, as per Statement by H. Victor Broenstrup, for 1958?

   c. Whether a determination made in 1949, etc., can be disregarded and costs basis and estimated useful life of properties be redetermined in 1958 without any significant changes, etc.?

   d. Limitations, res judicata, and or estoppel, etc.?

STATUES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth in Brief and Appendix of Petitioners, submitted herewith.

STATEMENT OF THE FACTS MATERIAL TO QUESTIONS PRESENTED

This case is based upon a notice of determination for a deficiency dated February 10, 1961, in the amount of $988.15, the alleged deficiency as determined by the Commissioner, respondent is in income taxes for the calendar year 1958, and included $420.35 net additional tax claimed to be due by the respondent and was based upon disallowance of a claim by the petitioner for an overpayment and a refund of $514.85.

In spite of the fact that the income tax regulations provide in addition to other matters that the estimated

remaining useful life shall be redetermined only when the change in the useful life is significant and there is a clear and convincing basis for the redetermination, probable future development, etc., and the *Statements of H. Victor Broenstrup*, reference the conference on July 26, 1962, and on August 29, 1962, wherein the respondents representative, after reviewing petitioner's records, etc., reference costs, depreciation, and other items as stated, etc., reference the various properties, acceded as to the authenticity of same, as very good and normal, etc.; and the consistant reviews, approvals and refunds made by the Internal Revenue Department, of all of the prior years since 1949.

1. The cost and the depreciation deductions used was determined from reliable sources and computed over the period of useful-life of 20 and 25 year allowances, rather than the longer economic life now being advocated in spite of the rules, law, etc., then in effect. The 20 and 25 year period was recommended by the respondent when the petitioner prepared the returns for allowable depreciation expense on rental property, all of which had been consistently reviewed and accepted by the respondent for all the prior years. (Resp., Ex. H. Tr., p. 173A-B, Cert. of Ass., and Payments) (Brief and Appendix of petitioners, page 11-12)

The composite life or group accounts had not been used or tabulated for equipment average life, which expired due to non-use, vacancy of building and the lack of maintenance, due to receivership on July 23, 1950, caused by the foreclosure due to the default of the conditional contracts for the purchase of part of the restaurant equipment, etc.

2. Where Treasury department Regulations had been operative for 20 years without material change and the revenue law to which it was applicable had not been frequently re-enacted, such regulation had the effect of law.

STATEMENT OF THE POINTS

3. The respondent's computation of allowable depreciation, rewrites the costs or other basis, and the depreciation allowance, life years, 40 or 50, for the taxable year ended December 31, 1958. The cost and depreciation allowances used by the petitioners had been consistently approved and refunds were made in all of the prior years, except illegal disallowance of the expenses for litigation incurred in regards the Easter v. Dundalk, ejectment cases, etc. (Pet. Ex. 2, 3, 4, p. 141, and Ex., 6, 7, p. 146).

A. The land for the structure built in 1949, consisted of .829 acre, and was a part of the entire tract of 7.2 acres bought in 1940, the entire costs of excavating, grading and surfacing for the parking area, construction of the wood and steel structure, including the plumbing, air conditioning, heating, overhead electric service from rear of acreage to building and installation of same for a first class restaurant and stone Bar B Que amounted to at least $75,000.

B. The costs of the improvements was established by the terms of a 30 year lease whereby all items required for the establishment and operation of a first class restaurant, were to be provided, including a mortgage loan for the balance of the construction costs; all considered, determined the rent allowance deductions for costs, including the actual net monthly cash balance of $125.00, for a period of the life of the mortgage (14 years), after the payment of said mortgage and with all other requirements the monthly cash balance was thereupon increased to $400.00. The receivership was in violation of the lease agreement, which required cash payments for all equipment, etc. (Lease filed December 6, 1948, Liber MLP 7648, F. 290, Resp. App. Ex. B, p. 30).

C. The respondent changed the basis for depreciation of the building, and the remaining useful life of same was

increased from 20 years to 40 years, all of which violated the following:

> Bulletin "F" Publication No. 173, Introduction page (1) para. 2. "* * *, Accordingly, it will continue to be the policy of the Internal Revenue Service generally not to disturb depreciation deductions, * * *."
>
> Para. 4, "* * *. However, taxpayers are cautioned that the useful lives are not mandatory, and were originally published solely as a guide to what might be considered reasonably normal periods of useful-life."
>
> Para. 5, "Taxpayers may determine reasonable periods of useful life for their depreciable property on the basis of *their* particular operating conditions, experience, and informed judgment as to technological improvements and economic changes."
>
> Page 3, Amusement Parks, since the above structure is a frame building of wood and steel, "* * *. A 20 year average is considered reasonable."
>
> Helpful Information, page 13, Schedule 1—Depreciation para. 2, "The cost (or other basis) to be recovered should be charged off over the expected useful-life of the property. * * *."

ARGUMENT

Since the improvements are of the type that could *not* be utilized for a commercial development, provided the present obstacles could be solved, in that event all of the present constructions would be entirely eliminated to provide for front parking, etc., as the present structure is now a part of the 6 acre-tract of which 5.101 acres are still vacant, therefore the above will be *eventually replaced by said contemplated development.*

Basis of cost of property, starting point—primary figure in compilation and includes all adjustments necessary to logical ascertainment of gain and loss. (Plans and Specifications, Pet. Appellant, Ex. I, p. 132)—(Rev. Act 1918, Sec. 202(o), U.S.C.A.—Title 26, Sec. 1011, p. 387, Int. Rev. Code, 701-2000)

> Statement by H. Victor Broenstrup a legal advisor, Re: 1958 Return—"*At a conference with Mr. A. B. Dunn, and Mr. A. N. Kauffman, in room 2238, of the Internal Revenue Building, Washington, D.C., on August 29, 1962, at 11 A.M., etc. after discussion reference costs of various properties, which were accepted as normal, etc., Mr. Easter offered to present the plans and other proof of costs of the building, etc., at 6608 Belair Road, Mr. Kauffman said in the presence of Mr. Dunn, and myself, that "he also acceded, as to the costs of the said property, as stated, etc.*" (Pet. Appellants' Prof. of Ex. J, p. 173-A-B)

"The useful-life of a depreciable asset as defined in section 1.167 (a)—I (b) of the Income Tax Regulation, is the period over which the asset may *reasonably be expected to be useful to the taxpayer in his trade or business* and not the period of the economic life of the asset. The regulation is valid." Hertz Corp. v. U.S. of America, Sup. Ct. No. 283, June 27, 1960)

PROOF OF EVIDENCE BY THE FACTS

The evidence of the petitioners, the testimony of the petitioner, are the true and correct ones in this respect due to the result of the information obtained from the various and reluctant contractors, plans and specifications of the 6608 restaurant project as to the $75000. cost. (Ex. I, p. 132) (Ex. J, p. 173-A-B)

The building was treated as a taxable transaction beginning on the later part of 1949 (Ex. 5, p. 146) and including 1950 (Ex. 6, p. 146), as recommended by re-

spondent when the petitioners prepared the said returns for costs and depreciation, 1951-54 including 1955-57 (Ex. 2, 3, 4, p. 141), all of which has been consistantly reviewed and accepted by the petitioners until subject 1958 return (Ex. A, p. 25); contra; and should be accepted by the Court. (Tr. p. 25, 114, c. 129; p. 137-150)

The petitioners request the court to review the transcript to the credibility of the respondents witnesses, including respondents' "expert", who was so absorbed in referring about his degrees, etc., that he had failed to develop natural or practical experience to see realistically, such as reporting 6502 Belair Road as vacant lot, non existing (Ex. E. p. 52), and his values of depreciation as shown and his lack or non-authority to determine Costs. (Tr. 42, c. 63) See photograph of subject property 6502, taken January 11, 1964.

The general contractor's son admitted that he had no personal knowledge as to the costs of 6608 and that his testimony was only from hearsay. (Tr. 66, c. 69)

The respondents two other witnesses were partners for about thirty years in various ventures, etc., and were one of the petitioner's original tenants of 6608, who petitioners had not seen since 1950, at which time they violated a 30 year lease agreement, (Ex. B, p. 28) prohibiting the purchasing of some of their restaurant equipment by conditional sales contract, etc., (Tr. 75, c. 81, 91, c. 98). In addition to the errors of their other testimony, they insisted that the contract price for the barbecue building was not over $2000., whereas the transcript of the Honey Lane receivership, page 21, line 19 stated, Goodman Construction Co. $5000., which was the original price and did not include the later extras, etc.

It is unbelievable the government would now wish to benefit by disallowing depreciation of the entire full cost of a building, etc., although the Cost and Useful Life had

been questioned, examined, re-examined, approved, refunds and credits allowed as shown on respondent's Certificate of Assessments and Payments, etc., and thereafter acceded to as normal for 1958 tax return, etc., by the Appellate Division of the Internal Revenue Service, (Resp., Ex. H. 1-3, T. p. 132) (Pet., Ex. J. T. p. 173-A-B) page 11-12 Brief and Appendix.

4. Any question raised as to the procedure in presenting the testimony was on agreeable basis and it is not now subject to question or exception. It was acceptable to all parties at the time, including the Judge, and the matters proceeded on an amiable and agreeable basis, as demonstrated by the submission of the following certificates, by request of the court:

CONCLUSION

It is unbeliveable that the government would wish to benefit by not allowing full depreciation of the entire costs of building regardless of the reasons, for the failure of some owner, etc., from depreciating a $75000. project; and as future usefull life is undeterminable due to realities, subject properties, especially 6502 having been and is now a vandilized condition and partly destroyed by fire, and 6608 having been built for a first class restaurant, which "failed" in 1949, is now used as a boat display agency, both of which will be involved in the future development of the entire tract of land presently owned by a petitioner, Re Detroit Edison case—the Supreme Court stated "*But we "think*".

Therefore, as the Costs and Useful Life of the subject properties have been approved in prior returns, etc., and the Costs had been acceded to by respondent in the prior conferences, the Internal Revenue Service's bulletins, guidelines and rules, information, law, etc.; the court citations, evidence, testimony, exhibits, etc., of the trial:

the index, the continued examination and re-examinations of the petitioners returns; all of which present facts and reasons why the Commissioner of Internal Revenue, should forthwith refund the overpayment of $514.85 for the year 1958, and the other claims of the subsequent years to date.

Since the remaining useful life cannot be redetermined until a change is significant and that there is a *clear and convincing* basis for redetermination, without taking into account probable future development as in herein case and the general experience of the industry, etc. Respondents actions are as if they had an undeniable right to question, advise, approve; deny, reverse, etc., resulting in costly administration, instead of their official and absolute duty to be correct and consistant in all of their functions, especially at the advisory and the determinable stages, etc. Since reaffirmation was established by examination and re-examinations of the petitioners returns since 1949-57, as proven by the respondents Certification of Assessments and Payments, printed herein and sustained by the bulletins, rules, law, etc.; the 1958 to the present determinations are not retroactive and are now barred by limitations, laches, res judicata and estoppel; all of the above has caused hardship, losses and damages to the petitioners, far in access of the respondent's alleged claims.

Respectfully submitted,

/s/ Andrew J. Easter,
In Proper Person,

/s/ Mildred P. Easter,
Temporary and forwarding address
2801 Adams Mill Road, N.W.,
Apt. 108, Washington, D.C.,
20009

Petitioners

Service (February 27, 1965)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9602

ON PETITION TO REVIEW THE DECISION OF THE TAX COURT OF THE UNITED STATES.

(Argued November 16, 1964. Decided December 1, 1964.)

Before SOBELOFF, Chief Judge, and BOREMAN and J. SPENCER BELL, Circuit Judges.

PER CURIAM:

We have carefully reviewed the decision of the Tax Court in this matter, and for the reasons set out in its opinion, we affirm.

The adjustment of the depreciation basis for the facilities located at 6608 Belair Road, Baltimore, Maryland, was clearly proper, since it is undisputed that the taxpayer himself invested only $28,000 in the buildings on that site. It is elemental that a taxpayer cannot recoup by means of depreciation deductions an investment in a depreciable asset made by a stranger. *Detroit Edison Co.* v. *Commissioner*, 319 U.S. 98, 102 (1943); *Commissioner* v. *Revere Land Co.*, 169 F.2d 469 (3 Cir.), *cert. denied*, 335 U.S. 853 (1948); *Commissioner* v. *Arundel-Brooks Concrete Corp.*, 152 F.2d 225 (4 Cir. 1945).

There also was no error in the redetermination of the remaining useful life of the other three pieces of property involved in this litigation, for the Tax Court decisions concerning the structures at both 2801 Adams Mill Road in Washington, D. C., and 6420 Belair Road in Baltimore are supported by substantial credible evidence in the record. Regarding the frame house located at 6502 Belair Road in Baltimore, neither the government nor the taxpayer produced evidence from which a decision could be made as to its reasonable estimated useful life. Since the Commissioner's determination in this regard is presumptively correct and the burden is upon the taxpayer to show error therein, *Burka* v. *Commissioner*, 179 F.2d 483 (4 Cir. 1950), the Tax Court had no choice but to accept the useful life position contended for by the Commissioner, and we have no choice but to affirm.

While it may be somewhat frustrating to him, the law is nonetheless settled that the acceptance of returns filed by the taxpayer in earlier years and the acquiescence in the taxpayer's depreciation basis and useful life figures contained therein for the purpose of approving tax refunds will not support the petitioner's estoppel argument or bar the Commissioner's action in correcting a mistake in the taxpayer's prior returns when it is detected by him within the period of limitations. *M. Pauline Casey*, 38 T. C. 357, 381 (1962); *cf. Caldwell* v. *Commissioner*, 202 F.2d 112, 115 (2 Cir. 1953).

Affirmed.